

Role of the Source Selection Authority in the A-76 Process

1. As an A-76 study, which uses “best ases value” procedures, study approaches the cost comparison stage, it is important to consider the role of the Source Selection Authority (SSA) after the selection of the successful private sector offeror and prior to the cost comparison between the successful private sector offeror and the Government’s in-house offer. Specifically, recent rulings by the General Accounting Office (GAO) and the United States Court of Federal Claims have focused on the importance of the analysis the SSA must conduct in order to determine whether the “level of performance and performance quality” outlined in the private sector proposal equates to that of the in-house offer.
2. There have been two recent decisions, one by the GAO and one by the United States Court of Federal Claims that provide additional guidance and clarification as to the role of the SSA and the SSEB in this regard.
3. The GAO’s decision in BAE Systems, B-287189; B-287189.2, May 14, 2001, appears to require the following:
 - a) The SSA must review every “strength” identified in the private sector proposal and make a determination whether it can be characterized as “meaningful”.
 - a) If a private sector strength is meaningful, then the SSA must ensure that the Government’s in-house offer includes the same level of performance and performance quality. If it does not, then the in-house offer must be revised.
 - a) If an identified strength is found not to be meaningful, then a record should be created documenting that the strength was considered and determined to be “not meaningful.” (It should be noted, however, that the GAO has provided no criteria for determining “meaningfulness”. If a feature of a private sector proposal was attractive enough to warrant its identification as a “strength” by the evaluators, it might be concluded that it is, by definition, “meaningful”. Nevertheless, the BAE decision does imply that a “non-meaningful” finding is possible.)
 - a) Although the scenario is not specifically addressed in the BAE decision, it appears clear that if the in-house offer cannot under any circumstances meet the same level of performance, then the private sector competitor must be allowed to revise its proposal so that it meets only the lesser level of performance called out by the PWS. (In the event that transpires, we need to consider whether this would also require us to re-open the evaluation of the private sector proposals to ensure that no unsuccessful private sector competitor was prejudiced.)

- a) If, during the course of this review, it comes to the attention of the SSA that the in-house offer does not satisfy the minimum PWS requirements (despite the fact that it has been certified by AAA), “that deficiency need(s) to be resolved before the agency could proceed to the public/private cost comparison.” The in-house offer may not be thrown out because of this shortcoming, however. Rather, it must be revised so as to meet the minimum PWS requirements. If that is impossible, then those requirements must be relaxed and the private sector competitor must be allowed to revise its proposal accordingly. (As mentioned in paragraph “d”, above, this situation might also require that the unsuccessful private sector proposals be re-opened.)

4. In Rust Constructors, Inc, v. The United States, decided 31 May 2001, the United States Court of Federal Claims made it absolutely clear that the “level of performance” review is completely distinct from the source selection evaluation that had been conducted between the private sector competitors. In that case, the Court rejected an unsuccessful private sector argument that in conducting an A-76 study the Government had “erred by failing to conduct a “best value analysis” when it compared its proposal to the government’s MEO.” In denying the unsuccessful offeror’s motion for summary judgment the Court held that:

Plaintiff contends that the evaluation of the government’s price failed to consider any elements of “best value” as required by the Solicitation. The Corps, however, was not required to determine whether Rust’s proposal or the MEO’s proposal offered the best value to the government. OMB Circular A-76 does not require the government to perform a best value analysis when comparing the performance of a commercial contractor to the government’s in-house staff. OMB Circular A-76 states that the determination of who will do the work is based upon a “comparison of the cost of contracting and the cost of in-house performance.” OMB Circular A-76, Para. 5(a).”

The Court also held that “(t)he Solicitation did not require the government to perform an analysis to determine whether the plaintiff’s proposal or the MEO represents the best value to the government. The Solicitation required that the choice be determined upon the basis of cost. Therefore, defendant’s failure to perform a best value comparison between Rust and the MEO did not violate applicable law, regulation or procedure and hence, does not support a basis for awarding plaintiff a permanent injunction.”

5. The Rust Constructors, Inc., v. The United States Court provides a good description of the SSA’s responsibilities after the private sector competitor has been selected, as follows:

After plaintiff was identified as the successful offeror, the Source Selection Evaluation Board (SSEB) compared the technical section of Plaintiff’s proposal

with the government's Technical Performance Plan. See AR at 36. Michael Whitacre, the SSEB Chairman, concluded that both organizations appear "capable of delivering quality service as defined by the technical requirements" and that each had proposed an equivalent level of work. See AR at 36. The Source Selection Authority, Larry M. Brom, confirmed this conclusion based upon his independent determination that "[Rust's] proposal does not exceed the performance or performance quality requirements of the solicitation or the [Technical Performance Plan]." AR at 36.

6. The Court held that the successful offeror must demonstrate that the procurement official's decision that the MEO did offer the same level of performance and performance quality as the successful private sector offeror "lacked a rational basis." The Court held that Contracting Officers are entitled to exercise discretion upon a broad range of issues, and that a reviewing court is required to "sustain an agency action evincing rational reasoning and consideration of relevant factors."

7. Based on the above ruling, it is clear that the comparison of the in-house offer with the successful private sector offer is an increasingly important and complex part of the A-76 process. The SSA must be satisfied that the in-house offer and the successful private sector offer are offering the same level of performance and performance quality before the cost comparison can take place. In addition, if in the course of this comparison the SSA or the SSEB members supporting him/her become aware that the in-house offer does not satisfy the minimum requirements of the PWS, then the deficiencies in the in-house offer must be resolved prior to the cost comparison.

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